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United States Supreme Court

October Term, 1964

NO. 1009

RONALD W. KEISER,

Petitioner,

v.

RICHARD HARTMAN, ROCCO DENICE, CHESTER J. TYSON, JR., F. RENE GOSSIAUX, STEPHEN J. WURN, JR., AGNES C. SULLIVAN, AND JOSEPH D. LOUGHRIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1965

No. _____

RONALD W. KEISER,
Petitioner,

v.

RICHARD HARTMAN, ROCCO DENICE, CHESTER J. TYSON, JR., F. RENE GOSSIAUX, STEPHEN J. WURN, JR., AGNES C. SULLIVAN, AND JOSEPH D. LOUGHRIN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To The Supreme Court of the United States:

The undersigned, on behalf of Ronald W. Keiser, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 21, 1964.

Opinions Below

The United States District Court for the District of New Jersey entered judgment for defendants on January 31, 1964 pursuant to Federal Rule 12(b)(6). (App., infra, p. 1a). The opinion of the United States Court of Appeals for the Third Circuit is reported at 339 F.2d 597 (App., infra p. 2a).

Jurisdiction

The judgment of the United States Court of Appeals was entered on December 21, 1964. (App., infra, p. 3a). No application for rehearing was made to the United States Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether employees of the federal government who knowingly and maliciously use the powers of their positions while acting "within the outer perimeter of their duties" for the purpose of wrongfully injuring innocent persons should be accorded an absolute immunity from suit for damages?

Statement of the Case

Ronald W. Keiser, the Petitioner herein, was hired by the Farmers' Home Administration (hereinafter called "F.H.A.") in November, 1951 as Assistant County Supervisor of its Burlington County, New Jersey office. In March, 1953 he was promoted to the position of County Supervisor. For the succeeding 9 years he was a faithful and efficient administrator, as attested by the fact that he was awarded every merit salary increment available to him during this period.

During most of the above period Petitioner was assigned to the F.H.A. office in Ocean County, which was then a major egg and poultry producing area. Petitioner's office became the largest case load office in New Jersey of the F.H.A. and Petitioner was entrusted with the responsibility of administering the F.H.A. program in the County, which included the granting, supervision and collection of over 175

real estate and crop mortgage loans advanced to farmers.

On October 5, 1959, largely through the efforts of Petitioner, Mrs. Glesby Dabney, a married Negro woman, was hired as a clerk-typist in Petitioner's office. She was the only Negro woman employed at that time in New Jersey by the F.H.A. as a clerk-typist.

Shortly after Mrs. Dabney was hired, Petitioner began to receive adverse criticism for hiring her. The criticism came first from Respondent Sullivan, who was sent to Ocean County from Trenton to instruct Mrs. Dabney as to her duties, and later from others of the Respondents. It was first directed at demonstrating to Petitioner that Mrs. Dabney was "not the right type of person" for the position because of her alleged lack of taste in her manner of dress and because her "attitude was not proper." Petitioner, recognizing the criticism to be pure prejudice, disregarded it. Later it was suggested strongly by Respondents Tyson and Gossieux that Petitioner submit adverse performance reports to Respondent Tyson about the quality of Mrs. Dabney's work so that her employment record could be used as a reason for denying her salary increases. This he refused to do. Thereupon several of the Respondents, for the purposes of (1) retaliating against Petitioner for having been instrumental in hiring a Negro to such a position and (2) causing him to be discharged from his position, maliciously instituted and participated in a campaign of defaming Petitioner to persons in and out of the employ of the F.H.A. by falsely insinuating and directly stating that he and Mrs. Dabney were involved in an illicit extra-marital affair which was being conducted in the F.H.A. office during regular office hours. When Petitioner was confronted with these rumors

by his superiors, he emphatically denied their truth and demanded that he be permitted to face the persons who accused him of this. His request was denied.

Matters were brought to a head on November 29, 1961 when Respondent Tyson prepared and forwarded to the Administrator, F.H.A., Washington, D.C., a letter charging that an improper relationship existed between Petitioner and Mrs. Dabney and citing an unsubstantiated and maliciously distorted version of an incident that had occurred at the F.H.A. office some time previously. This incident was used maliciously as a means of bringing about a situation that would result in the dismissal of Petitioner and Mrs. Dabney from their respective positions.

On or about December 4, 1961, Respondent Loughrin, an investigator employed by F.H.A., arrived in New Jersey to investigate the charges contained in Respondent Tyson's letter of November 29, 1961. During the course of his investigation, Respondent Loughrin interviewed a number of persons employed by the F.H.A., both in and out of Ocean County, and by intimidation or threat tried to obtain statements charging Petitioner with improper conduct. Most persons refused to make such a statement. The remaining Respondents did give written statements knowing them to be false or based upon rumor rather than personal observation. Those statements appear in the Appendix, filed with the Court of Appeals. In addition, Respondent Loughrin submitted an unsworn report of investigation wherein he knowingly and maliciously distorted information related to him by persons who refused to be intimidated into signing false written statements. A portion of that report of investigation appears in the Appendix filed with the Court of Appeals. (App., p. 63a-65a).

On February 2, 1962, as a result of the tortious conduct of the Respondents, Petitioner was served with a letter charging him with "conduct prejudicial to the best interests of the service." Petitioner filed an answer denying the charges and demanded a hearing and the opportunity to confront and cross-examine the witnesses against him. On March 27, 1962 a conference was held in Trenton, New Jersey, at which time Petitioner and his counsel were present as well as James A. Somerville, Director of Personnel of the F.H.A. and Respondent Tyson. No witnesses were called by the F.H.A. nor was any more specific information given as to the charges. By letter of Decision dated June 18, 1962 Petitioner was ordered removed from his position effective June 27, 1962. At a later date, in connection with an appeal of his discharge, Petitioner, for the first time, learned of the existence of the statements above referred to. At no time has he been given the opportunity to confront any adverse witnesses although he has requested this at every step of the proceedings before the Civil Service Commission.

This action was instituted in the Superior Court of New Jersey on November 29, 1962. It was removed to the United States District Court for the District of New Jersey on December 26, 1962 by the United States Attorney on Petition for Removal pursuant to 28 U.S.C. 1442.

Argument

This action is brought on behalf of an innocent federal employee who was the victim of the malicious torts of other federal employees "acting within the outer perimeter of their duties." It presents for re-consideration the law announced by this Court in Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed.

2d 1434 (1959). If it is determined that there is to continue to be no redress for a person victimized by malicious federal officials, then this Petition should be rejected.

This Petition seeks review of the affirmance of a judgment entered by the United States District Court granting defendants' motion for judgment on the pleadings made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In considering this Petition, all facts well pleaded are to be considered as true. Art Metal Construction Co. v. Lehigh Structural Steel Co., 116 F.2d 57 (3d Cir., 1940). It is submitted that the Complaint sets forth facts sufficient, if proven, to establish causes of action for libel, slander, malicious interference with contractual relations, malicious with interference with prospective economic advantage, false imprisonment, and malicious prosecution.

The Barr case, supra, and its companion case, Howard v. Lyons, 360 U.S. 593, 79 S. Ct. 1331, 3 L. Ed. 2d 1454 (1959) hold that employees of the executive branch of the federal government are absolutely immune from liability for malicious torts committed by them while acting "within the other perimeter of their duties." This immunity is extended to all federal executive employees without regard to rank—to cabinet members and minor clerks alike. All malicious acts are included within the privilege so long as the act complained of bears some relationship to "matters commited by law to their control or supervision." See 3 L. Ed. 2d, at 1442. Nor does it matter that the federal employee acted voluntarily rather than by direction of his superiors or in the performance of an act that was mandatory. See 3 L. Ed. 2d, at 1443.

The Barr case raises a basic question of our national political philosophy. It announced, as the rationale for its holding:

> "The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrased by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government." At 360 U.S. 571.

Thus it became our law that when the two conflict, efficiency of federal governmental administration is to be regarded as a greater societal value than the protection of a citizen from oppression by malicious governmental employees "acting within the outer perimeter of their duties."

The possibilities for injustice inherent in such a rule of law have been recognized even by its judicial exponents.

> "It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery * * * ." (Emphasis supplied) Per Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir., 1949).

> "* * * To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good." Per Mr. Justice Harlan in Barr v. Matteo, at 360 U.S. 576.

More than five years have elapsed between the decision in Barr and the writing of this Petition. We are now able, to some extent, to evaluate some of the results of that rule. In Poss v. Lieberman, 299 F.2d 358 (2d Cir., 1962), a reputable attorney was denied relief against a claims representative of the Social Security Administration who maliciously and falsely reported that the attorney (1) had been disbarred and (2) had purposely concealed that fact while acting as an attorney before the Administration. In Steinberg v. O'Connor, 200 F. Supp. 737 (D. Conn., 1961) a citizen was denied relief against a State Department employee who, in a speech before the V.F.W., made strong remarks against persons applying for passports to go overseas to aid the Communist cause and, in subsequent testimony before a Senate sub-committee, falsely identified the plaintiff as such a person. In Preble v. Johnson, 275 F.2d 275 (10th Cir., 1960) various employees of an Air Base were given immunity from suit after having uttered maliciously defamatory statements about a fellow employee to a chairman of a grievance committee. In Blitz v. Bogg, 328 F.2d 596 (2nd Cir., 1964), Cert. Den. 13 L. Ed. 2d 58 (1964), the privilege was extended to a government physician in a false imprisonment action. In Norton v. McShane, 332 F.2d 855 (5th Cir., 1964), U.S. Marshals were shielded against suit by persons alleging that they had been assaulted and battered and otherwise brutally treated after they were arrested by the Marshals.

In Sauber v. Gliedman, 28 F.2d 941 (7th Cir. 1964), Cert. Den., 366 U.S. 906, a special assistant attorney general was given immunity from suit for libelous newspaper publicity released by him charging the plaintiff with defrauding the government and corruption. In Wozencraft v. Captiva, 314 F.2d 288 (5th Cir., 1963) a federal employee was unable to obtain redress against his supervisor for libelous remarks that resulted in his dismissal from his employment. It would not be unreasonable to presume that a number of other persons maliciously injured by federal employees have withheld instituting suit because of the Barr ruling.

Barr holds that the above is a "price * * * necessary * * * to pay for the greater good." See 3 L. Ed. 2d, at 1444. Petitioner contends that the price is not "necessary" and that the result achieved is not a "greater good."

The price paid for the absolute privilege is clear and capable of empirical proof. In this case Ronald W. Keiser has been subjected to public ridicule and disgrace, has had his morality made a public issue, has been banished from a career of governmental service and has been made to suffer an economic loss that mounts as each day ends, all because he hired a clerk-typist to work for our federal government without regard to the color of her skin. Nor has Ronald Keiser been the only one injured by malicious governmental employees. The facts of each and every reported case dealing with this problem, both before and since Barr, testify even more luridly the extent of the "price paid" for the privilege.

The justification advanced for the rule is that efficient administration of our national affairs would break down if the rule were otherwise. Petitioner, in

the dissenting words of Mr. Justice Brennan, states: "This, I fear, is a gossamer web self-spun without a scintilla of support to which one can point." Barr v. Matteo, 3 L. Ed. 2d, at 1451. Rather, the proof is to the contrary. A number of the states grant only a qualified privilege and others limit the absolute privilege to Cabinet level officials. A more complete analysis appears in Becht, The Absolute Privilege of the Executive in Defamation, 15 Vand. L. Rev. (1962). The experience of European Civil Code nations also negates the hypothesis of the Court in Barr. In many of those countries the offending official is held answerable for his malicious torts and, in numerous instances, the State can be sued directly for officially inflicted harm. Schwartz, Public Tort Liability in France, 29 N.Y.U.L. Rev. 1432 (1954); R.J. Grey, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 309 (1959). In these countries, the state realistically assumes the responsibility for disciplining malicious officials. None of the opinions or dissertations uncovered by this writer contain any indication that such a rule of law has produced governmental inefficiency or an intolerable amount of litigation. Nor was any information uncovered which would substantiate that the American states which extend only a qualified privilege to executive tortfeasors are plagued by governmental inefficiency emanating from that source. Even more persuasive is the experience of the federal government since enactment of the Federal Tort Claims Act. Under that statute, thousands of suits have been instituted yearly against federal government employees and against the federal government. Time has been devoted by the defendant employees to preparation for and attendance at court. Many injured persons prevail, others lose — all depending upon the merits of each individual case. Yet there seems to be no evidence to support a conclusion that liability for simple negligence has caused

a breakdown in governmental administration. To the contrary, it has produced a greater awareness of the need for safety and has promoted greater efforts to avoid negligent injury to innocent citizens.

The law should not be more restrictive when a malicious tort is involved. If governmental efficiency is not demonstrably impaired by holding all federal employees liable for injuries caused by even a momentary failure to act as a reasonably prudent person under the same circumstances, why is it necessary that all federal executive employees, regardless of rank or the necessity for their having to act, be given an immunity to suit for injuries caused by their purposely malicious conduct within that broad area of activity defined as the "outer perimeter of their duties"? It is submitted that such a rule tends to create an atmosphere within which persons of ill will can use their positions to harm others maliciously with the assurance that they are not only immune from suit but also will be spared the expense of having to defend any actions brought by the victims of their malice. It removes all necessity for prudent reflection and for critical evaluation and analysis, thereby creating greater possibilities for error and consequent governmental inefficiency. Further, it places the entire loss upon the injured person rather than the wrongdoer and leaves the injured person without any means to protect himself -- a result repugnant to every concept of fair play and justice and to the traditions of the Common Law. It is the type of rule to which resort should be made in only the most demanding of circumstances and then only after substantial proof has been advanced to substantiate the harm that would result if such a rule did not exist. Yet no such proof appears to have been advanced in Barr or any of the other cases dealing with this problem.

Absolute immunity in the area of executive activity is neither a legislative nor a constitutional product. Its origin and extent stem solely from judicial decision. Its future course may be charted by judicial decision. Its history is related in detail in Professor Becht's article heretofore cited. Its development seems to have resulted from a fear by the judiciary that our system of justice is not sufficiently developed to produce an acceptable result where the trier of the fact has to evaluate the nature of the act committed by the offending official. Judge Learned Hand, in his opinion in Gregoire, supra, stated the problem in those very terms when he said it would be monstrous to deny recovery:

> " * * *, if it were possible in practice to confine such complaints to the guilty * * *". 177 F.2nd 579, 581.

Yet in other cases this Court has recognized the ability of the trier of the fact to distinguish between malicious and non-malicious acts and has recently, in the case of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), decreed that a jury must make that very determination in cases involving defamation suits brought against critics of public officials. Juries make the very same determination in suits brought against state employees in states where the qualified privilege rule exists. Why should not the trier of the fact be equally capable of determining this issue when the defendant happens to be a federal employee? It is submitted that no logical reason exists for the distinction.

This Court has in recent years established itself as the guardian of the individual rights of all citizens, even in the most unpopular of causes. In the School Prayer cases, in the Segregation Cases, in the Search

and Seizure cases and in the Sullivan case, this Court has protected the rights of the individual, even at the expense of disturbing the existing societal order. It is submitted that a citizen maliciously deprived of his reputation, of his property rights and of his employment should be entitled to at least some protection against harm by the malicious conduct of government employees.

In conclusion, Petitioner appeals to this Court to apply to this case the philosophy that impelled it to announce:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence. * * * If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Mapp v. Ohio, 367 U.S. 643, 649, 81 S. Ct. 1684, L. Ed. 2nd 1081 (1961).

Conclusion

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

EWART, LOMELL, MUCCIFORI & ADLER
Attorneys for Petitioner

By:
HERMAN A. ADLER
A member of the firm

APPENDIX

Judgment on Pleadings

(Filed Jan. 31, 1964)

This matter having been opened to the Court by David M. Satz, Jr., United States Attorney, Attorney for Defendants, Alfred Abbotts, Assistant United States Attorney, appearing, in the presence of Ewart, Lomell & Muccifori, Attorneys for Plaintiff, Herman A. Adler appearing, for judgment on the pleadings; and

The Court having reviewed the pleadings having made certain findings more particularly incorporated in the Pretrial Order filed in this matter with the Clerk of this Court on December 3, 1963, which Pretrial Order is incorporated herein by reference; and

The Court having found that this action is governed by the law as set forth in the opinion of the Supreme Court of the United States in Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d. 1434 (1959) and that the activities of all of the defendants fall within the privilege set forth in the aforesaid case and good cause therefore appearing:

It is on this 31st day of January, 1964, ORDERED and ADJUDGED that the complaint of plaintiff in this action be, and the same is hereby, dismissed as against each and every defendant in this action with prejudice and without costs to any of the parties.

s/ Arthur S. Lane
UNITED STATES DISTRICT JUDGE

We consent to the form of the above Judgment.

EWART, LOMELL & MUCCIFORI
Attorneys for Plaintiff,

By s/ Herman A. Adler
A Member of the Firm

Opinion of the Court

(Filed December 21, 1964)

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 14841

RONALD W. KEISER,

Appellant

RICHARD P. HARTMAN, ROCCO F. DENICE, STEPHEN J. WURN, JR., F. RENE GOSSIAUX, CHESTER J. TYSON, JR., AGNES C. SULLIVAN and JOSEPH D. LOUGHRIN

Appeal From the United States District Court for the District of New Jersey

Argued November 16, 1964
Before Maris, Staley and Ganey, Circuit Judges.

Opinion of the Court

Per Curiam:

The plaintiff, a former employee of the Department of Agriculture, appeals from a judgment of the district court dismissing his complaint against seven fellow employees of the Department seeking damages for alleged libel and other tortious conduct. The plaintiff conceded that the defendants' acts were within the outer perimeter of their line of duty as Federal employees. The action of the district court was based upon its conclusion that the acts were accordingly absolutely privileged under the rule laid down by the Supreme Court in Barr v. Matteo, 1959, 360 U.S. 564, 575. The district court rightly held that Barr v. Matteo rules this case and its action in dismissing the complaint must be affirmed. Indeed counsel for the plaintiff frankly conceded as much at bar, his expressed hope being to persuade the Supreme Court on certiorari to overrule that decision. This the Supreme Court may do if so advised, but we may not.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 14, 841

RONALD W. KEISER,
Appellant

v.

RICHARD P. HARTMAN, ROCCO F. DENICE, STEPHEN J. WURN, JR., F. RENE GOSSIAUX, CHESTER J. TYSON, JR., AGNES C. SULLIVAN and JOSEPH D. LOUGHRIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ----- DISTRICT OF NEW JERSEY

Present: MARIS, STALEY and GANEY, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the ----- District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed January 31, 1964, in this case be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF

Clerk

December 21, 1964